GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16154 of Ping Lu, Inc., as amended, pursuant to 11 DCMR 3105.1 and 3200.2, from the administrative decision of Gladys Hicks, Acting Zoning Administrator made on January 15 and 17, 1997, to the effect that the owner must seek a special exception under Section 2003 to change a nonconforming use to another nonconforming use or a variance from Subsection 320.3 of the Zoning Regulations to operate "primarily for consumption on the premises with the principal use to be delivery of prepared food by motor vehicle to customers located off premises" in an R-3 District at premises 1659-61 35th Street, NW (Square 1291, Lot 217).

**HEARING DATES:** **November 20, 1996 and January 29, 1997**
**DECISION DATE:** **March 5, 1997**

**ORDER**

**SUMMARY OF EVIDENCE AND PROCEEDINGS:**

**1.** The subject application for a building permit by Ping Lu, Inc., for interior construction to permit the establishment of a Papa John's Pizza establishment at 1659-1661 35th Street, was filed in 1995 and initially approved by the Acting Zoning Administrator on March 28, 1996. The building permit authorized certain internal modifications for continuation of a nonconforming use of the site as a restaurant. The Georgetown Homeowners Alliance ("GHA") sought review of the issuance of the building permit by the Board of Zoning Adjustment (the "Board"). In its appeal, GHA contended that the construction authorized was in violation of the Zoning Regulations regarding the establishment of a fast food restaurant or food delivery business in an R-3 zone. Specifically, since the previous use, a restaurant, was nonconforming, GHA claimed that any other use would require a variance (or a special exception if the new use were permitted as a matter-of-right in the same district in which the existing nonconforming use was first permitted as a matter of right. See 11 DCMR Subsection 2003.5. The previously existing use, a restaurant seating less than 50 people, is a permitted use in the C-1 District; however, food delivery businesses and fast food restaurants are first permitted in the C-2-A District.

**2.** On July 18, 1996, DCRA issued a notice of proposed action to revoke building permits issued to Ping Lu, Inc., for Papa John's. On July 24, 1996, DCRA issued an amended notice of proposed action and, on August 2, 1996, Ping Lu, Inc., filed an appeal with the Board, moved to consolidate its appeal with the appeal of GHA and filed an appeal with the Office of Adjudication, Department of Consumer and Regulatory Affairs (DCRA). Since then, Ping Lu, Inc.

has made it clear that it intends to operate the site chiefly as a carry-out or pizza delivery use, with a subordinate restaurant use.

**3.** The Board requested that the Acting Zoning Administrator consider the new representations of Ping Lu, Inc., including Ping Lu, Inc.'s claim that the carry-out and pizza delivery uses were grandfathered. In her submission to the Board, the Acting Zoning Administrator rejected Ping Lu, Inc.'s (hereinafter the "appellant") claim and concluded that, in order to establish the proposed use, relief is necessary from the application of the Zoning Regulations.

**4.** A "restaurant" is defined in the Zoning Regulations as

> a place of business where food, drinks or refreshments are prepared and sold to customers **primarily for consumption on the premises.** This term shall include, but not be limited to an establishment known as a cafe, lunch counter, cafeteria or other similar business, but shall not include a fast food restaurant. **In a restaurant, any facilities for carry-out shall be clearly subordinate to the principal use providing prepared foods for consumption on the premises.** (32 DCR 4374)and (11 DCMR Section 199)(Emphasis added)

Similarly, a "fast food restaurant" is defined as

> a place of business devoted to the preparation and retail sale of ready-to-consume food or beverages for consumption on or off the premises. A restaurant will be considered a fast food restaurant if it has a drive-through. A restaurant will be considered a fast food restaurant if the floor space allocated and used for customer queuing self-service for carry out and on-premises consumption is greater than ten percent (10%) of the total floor space on any one (1) floor which is accessible to the public, and it exhibits one (1) of the two (2) following characteristics:
>
> **(a)** At least sixty percent (60%) of the food items are already prepared or packaged before the customer places an order; and
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> **(b)** The establishment primarily serves its food and beverages in disposable containers and provides disposable tableware. (This

> definition does not include an establishment known as retail grocery store, convenience store, ice cream parlor, delicatessen, or other businesses selling food or beverages as an accessory use, or for off-premises preparation and consumption.) (32 DC R 4374)

The Regulations define "food delivery business" as

> a restaurant, delicatessen or fast food restaurant in which the principal use is delivery of prepared food by motor vehicle to customers located off the business premises. Seating and tables for customers may or may not be provided for on-premises consumption, but if present are clearly subordinate to the principal use of delivering prepared food to off-site customers. Any establishment that derives more than seventy-five percent (75%) of its sales from delivery orders will be considered a food delivery service in all cases. This definition does not include catering establishments. (11 DCMR Section 199)

**5.** Contradictions arose in the testimony of Basil Gogos, owner of the property at issue. In the end, after the Board reviewed his testimony carefully with him and asked Mr. Gogos to state clearly what he had meant to say, he said that the Cafe a GoGo and the Hoya Inn, "both had minimal delivery; they had maximum carry-out, both of them" (Tr. at 160-161, 162), ratifying his earlier testimony that delivery at the Cafe a GoGo was "minimal," as it was for the Hoya Inn. Tr. at 103. Similarly, Mr. Gogos testified that when Don Phillips took over the Hoya Inn, the business was carry out, although he had no idea what percentage was represented. Tr. at 159, 165. Mr. Gogos testified also that a facility that followed the Hoya Inn had carry-out but no delivery. Tr. at 108.

**6.** The Board notes in this regard that pleadings submitted in evidence concerning a governmental action against one of the operators at the premises, George Gionis, made no mention of food delivery occurring from the premises.

**7.** Nothing in the testimony of Mr. Gogos indicated that food delivery had been any substantial part of the operation of the business until, at the earliest, 1986, when the premises began to be operated by the Orient Express. The Board here notes the testimony given in this regard, without addressing the legality of

any use for delivery or carry-out in the proportions claimed. That aspect of the case is addressed in the conclusions of law.

**8.** As to what percentage or proportion carry-out and delivery represented as part of the Orient Express' business, the testimony and evidence were in conflict. Although Mr. Gogos testified that up to 80 percent of the Orient Express' business was carry-out and delivery (Tr. at 103, 112), he also said that he had persuaded the owner of the business to fight (successfully, as it turned out) a government citation charging that the premises were being used as a fast food restaurant emphasizing the take-out part of the business. Tr. at 105.

**9.** At prior proceedings in court involving the premises (the Gionis suit, discussed in more detail below), the operator of the Hoya Inn at the premises argued in his pre-trial statement that carry-out constituted "approximately 10-15 percent" of the business, an assertion that directly contradicts Mr. Gogos' view that carry-out was "up to 70 percent carry-out and delivery" (Tr. at 100) and "probably 80 percent" (Tr. at 147) at the Hoya Inn, given that, by his own testimony, delivery by itself was minimal.

**10.** Witness Domenica Lamonte testified that she had not seen much carry-out business at the Hoya Inn, and certainly no delivery. Tr. 369-370.

**11.** Mr. Richard Emmett, an official of Papa John's and an officer of Ping Lu, Inc., testified at the hearing in this matter that he expected that the overwhelming majority of sales at the 35th Street location would be delivery, with a smaller percentage of carry-out and only 10 percent as eat-in. In its post-hearing submission, the appellant indicated that it anticipates using only disposable tableware and utensils, and serving drinks in disposable containers. The appellant has further represented that there will be no waiters at the restaurant and that the delivery area from the location will range from the C & O Canal and M Street, NW, on the south, to Wisconsin Avenue on the east, Chain Bridge Road, NW on the west and the Cathedral Heights area on the north, although fliers advertising the delivery service have been sent to areas abutting Chevy Chase, Maryland.

**12.** Appellant's witness, Mr. Basil Gogos, the owner of the property, testified that, since he purchased the property in 1965, the use was predominately a "Mom and Pop operation", as a carry-out, with some delivery and eat-in use in the 1980's. Appellant argued that since the property had been used as a carry-out before the fast food regulations were adopted by the Zoning Commission in 1985, and as a food delivery business before the food delivery regulations were adopted by the Zoning Commission in 1993, those uses were grandfathered.

**13.** Based on the testimony of Mr. Gogos, Mr. Stephen Sher, expert witness in planning and zoning issues, presented his opinion that, since the use of the site had included both carry-out and delivery uses prior to the establishment of recent specific Zoning Regulations with separate requirements and definitions for these uses, these uses had been grandfathered as nonconforming uses. Mr. Sher did admit upon cross-examination, however, that in two prior BZA cases, Appeal Nos. 10291 and 10485, the former operator of an eating establishment on the premises had been denied the ability to change the existing certificate of occupancy, or to receive a variance, to include a carry-out operation.

**14.** Mr. Sher also relied upon a prior case regarding a Burger King on Capitol Hill in which a separate certificate of occupancy was not required for a fast food use. According to the appellant, since the then Zoning Administrator characterized fast food restaurants as restaurants, where both were permitted as a matter-of-right, such a determination should also apply where a non-fast food restaurant had been established as a nonconforming use so as to permit a fast food restaurant after the grandfathering of the other use. This argument does not comport with the law regarding nonconforming uses and the right to change the nature of the use under the Zoning Regulations. Mr. Sher did admit upon cross-examination, that the fast food use in question was in a commercial zone, and was not a nonconforming use, thus recognizing the lack of reliance on interpretations regarding matter-of-right uses. Mr. Sher suggested that, since "restaurant" was not defined in the Zoning Regulations until 1985, the definition of restaurant must be that given by Webster's Unabridged Dictionary. He suggested that Webster's defines restaurant as "an establishment where refreshments or meals may be procured by the public: a public eating house."

**15.** Mr. Sher cited a 1973 Superior Court case in which former restaurant owner, Mr. Gionis, was sued by the District of Columbia. The case was dismissed with prejudice, with a number of stipulations. Mr. Sher argued that, since the stipulations did not specifically require the owner to get a new certificate of occupancy, nor to discontinue the purported carry-out portion of his operation, those facts proved that the restaurant was legally operating as a carry-out. However, it was pointed out later that Mr. Gionis was already restricted by the terms of his certificate of occupancy to operate only a restaurant seating less than 50 and that, in fact, counsel for the restaurant owner had represented that a carry-out business was a minor portion of the use of the premises. In that regard, a March 23, 1973 letter introduced into the record from Mr. Whayne Quin of Wilkes, Artis, Hedrick and Lane, counsel to Mr. Gionis re: the subject premises, stated that:

> Absolutely no pre-prepared or "ready-to-eat food products" are available such as would be available at a "delicatessen." Moreover, in no sense of analysis, is Mr. Gionnis' business "90% . . . carry out." His business is a "restaurant" with the necessary indicia to make it a restaurant.

**16.** Ms. Gladys Hicks, Acting Zoning Administrator, submitted a report on January 16, 1997 which stated that past reports by zoning inspectors provided "no evidence of the premises being used primarily as a carry out with delivery service and with the restaurant as a subordinate dine-in use".

**17.** Ms. Hicks testified before the Board that her conclusion, from her investigation of the case, was that Ping Lu, Inc., should have requested either a special exception or a variance in order to operate a food delivery service on the site, and that the proposed use could not be considered merely an extension of the existing nonconforming use.

**18.** Ms. Ellen McCarthy, the expert planner for the Georgetown Homeowners' Alliance, cited the Zoning Regulations and the enabling act which indicate that nonconforming uses are to be construed narrowly, with the goal that they eventually will be phased out. Ms. McCarthy stated that, although there might have been other uses on the site after 1958, when the Zoning Regulations were adopted making the site nonconforming, the certificate of occupancy at the time of adoption of the regulations was as a restaurant serving less than 50 persons, and that constitutes the only legal use for the property. She indicated that the appellant's argument that both the fast food use and the food delivery use had been grandfathered was false because the Zoning Regulations specifically require that only legal uses are permitted to remain as nonconforming uses. She pointed out that:

**a.** Contrary to the arguments by the appellant, had the Davis Grill, the restaurant in existence when the 1958 regulations were adopted, been predominately a carry out use instead of primarily a restaurant use, there were categories of certificates of occupancy issued at that time for uses other than restaurant (including "delicatessen" and "light-lunch"), which would have been applied. However, the certificate of occupancy legally established at the time the use became nonconforming was specifically for a restaurant.

**b.** Subsequent attempts to operate a predominantly carry out operation were cited by the Zoning Administrator as operating illegally. In fact, in

> 1970-1971, the Board of Zoning Adjustment refused to allow the facility to obtain a certificate of occupancy as a carry out, because that was not consistent with the use which had been grandfathered. In addition, in 1993, in response to neighborhood complaints that the restaurant was operating as an illegal carry out/delivery business (which were denied by the operator, Ping Lu, Inc.), the Department of Consumer and Regulatory Affairs administrative law judge dismissed the case because of testimony from the Zoning Inspector that he had observed predominately eat-in use.

Ms. McCarthy concluded that, in light of the clear fact that the primary legal use of the property was that of restaurant, the grandfathering of the nonconforming use does not permit a change to a new primary use which is not permitted in the zone district.

**19.** Ms. McCarthy further indicated that, in addition to serving as a food delivery business, which the appellant had admitted, the tenant also met the definition of a fast food business, since, the appellant admitted its intent to use disposable tableware; and, since, when one included the corridor where the beverage vending machine is located for the customers to serve themselves beverages and where the pick-up window for pizza is located, over 10 percent of the total floor space on the main floor which is accessible to the public is used for "customer queuing self-service for carry out and on-premises consumption" (§ 199, Zoning Regulations, "definition of fast food restaurant"). Attempts by the appellant's expert planner to dispute this later, showed that his calculations did not include the self-service area by the beverage vending machine.

**20.** William Cochran, Chairman of the Citizen's Association of Georgetown, also testified in opposition to the appeal. Mr. Cochran alluded to the history of the use of the premises and submitted to the Board an Opinion of the Corporation Counsel which stated that the existing premises could not be converted to use as a carry-out because the use grandfathered by the Zoning Regulations was that of a dine-in restaurant.

**FINDINGS OF FACT:**

**1.** As of the effective date of the adoption of the Zoning Regulations in 1958, the subject premises were being used as a restaurant, seating less than 50 persons. The appellant presented insufficient evidence to show that a carry-out use or a food delivery use existed at the premises in 1958. The dine-in restaurant was a nonconforming use.

**2.** A use which is primarily food delivery, fast food or food carry-out has never been lawfully established at the subject premises since 1958. Prior decisions of the Board have established that fact and the appellant is estopped from claiming otherwise.

**3.** The proposed use of the subject premises is both a food delivery business and a fast food restaurant.

**4.** At least since 1986, the premises has been used as a food delivery and carry out use.

**5.** The Board finds that some carry-out existed at the premises as far back as around 1966, when Basil Gogos took over the premises; that there is no evidence that carry-out existed at the premises prior to that time except as it may have occurred as an incidental or minor part of the operation of businesses at the premises, nor at the successor to the Hoya Inn before the Orient Express; and that there is no evidence that delivery was made from the premises any earlier than when the premises were taken over by the Orient Express in 1986. In other words, delivery as a use did not predate the 1985 amendments to the Zoning Regulations, while carry-out did exist as an incidental use for part of the time predating the rules. The availability of a carry-out use at the premises is further discussed in the conclusions of law.

**6.** The Board, finally, finds that PLI intends to turn what was originally a dine-in restaurant use with an incidental carry-out use into a primary use for food delivery with a secondary but significant carry-out use.

**CONCLUSIONS OF LAW AND OPINION:**

The District of Columbia Zoning Regulations provide for the continuation of a nonconforming use under certain circumstances. The proposed use for the premises at issue, however, does not qualify as such a use, pursuant to both statutory and regulatory provisions.

D.C. Code Section 5-423 provides that:

> [t]he lawful use of a building or premises as existing and lawful at the time of the original adoption of any regulation heretofore adopted under the authority of § 5-412, or, in the case of any regulation adopted after June 20, 1938, under §§ 5-413 to 5-432, at the time of such adoption, may be continued although such use does not conform with the provisions of such regulation, provided no structural alteration, except such as may be required by

> law or regulation, or no enlargement is made or no new building is erected. The Zoning Commission may in its discretion provide, upon such terms and conditions as may be set forth in the regulations, for the extension of any such nonconforming use throughout the building and for the substitution of nonconforming uses. (Emphasis added.)

The language emphasized above makes clear that the statute was not meant to provide for automatic, self-determined adoptions of uses without the prior approval of the Zoning Commission. Only a use that was lawful at the time of adoption or amendment of the rules may be continued. Such a use is not any one that might have been undertaken for any premises covered by similar certificates of occupancy, but rather the [specific] "use of a [particular] building or premises as existing....at the time"--not one which might have been, but the one that, in fact, was. The statute, in addition, conditions the adoption of such a use on there being no structural alteration of the building at issue, and no enlargement or new construction. Finally, the statute makes clear that a prior existing nonconforming use is to remain limited to its original dimensions: it may not be extended throughout the building, nor substituted for another use, except subject to such terms and conditions as the Zoning Commission may provide in its discretion.

That the statute is to be construed strictly and restrictively is confirmed by the interpreting regulations.

> **2000.2** Within the districts established by this title, or in amendments that may later be adopted, there exist structures, uses of land, and uses of structures that were lawful before this title was adopted or regulated, or restricted under the terms of this title or future amendments to this title. It shall be the intent of this title that nonconformities shall not be enlarged upon, expanded, or extended, nor shall they be used as a basis for adding other structures or uses prohibited elsewhere in the same district. (Emphasis added.)
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> **2000.3** It is necessary and consistent with the establishment of the separate districts of this title that all uses and structures incompatible with permitted uses or structures shall be regulated strictly and permitted only under rigid

> controls, to the extent permitted by the Zoning Act of June 20, 1938, as amended. (Emphasis added.)
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> **2000.5** A nonconforming use of land, or of land with structures incidental to the use of the land, shall neither be extended in land area nor changed to any use except a use permitted in the district in which the property is located. (Emphasis added.)

A subsequent subsection adds the following:

> **2002.3** A nonconforming use shall not be extended to portions of a structure not devoted to that nonconforming use at the time of enactment or amendment of this title, or to another structure.

It is clear, therefore, under the applicable statute and rules, that a nonconforming use -- assuming that it is lawful and otherwise appropriate -- may not be extended to portions of a structure that were not devoted to that use prior to the time when the use became nonconforming; nor may such a use be expanded to include, nor be substituted by, a new nonconforming use, even within an existing and unchanged structure. An existing nonconforming use must remain limited to the dimensions, both physical and functional, of that use at the time of the amendment of the regulations. These conclusions, derived from the statutory and regulatory provisions cited above, are also supported by case law, as is discussed in the following section.

The District of Columbia Court of Appeals has ruled that nonconforming uses are not favored and must be regulated strictly so that the goals of the districting scheme established by the Zoning Commission are not undercut. C&P Bldg. Ltd. Partnership v. District of Columbia Board of Zoning Adjustment, 442 A.2d 129 (D.C. 1982). The Court ruled that at the time that restricting zoning regulations are adopted, an accessory use, understood as a use incidental to the principal use and located on the same lot, cannot become the basis for a principal nonconforming use. See also Edward J. Lenkin v. District of Columbia Board of Zoning Adjustment, 428 A.2d 356 (D.C. 1981).

As a nonconforming use, Papa John's should not have been issued a building permit. The Administrator of the Building and Land Regulation Administration stated in an April 8, 1996 letter

that a "restaurant" use for the site is being permitted because it represents a continuation of a previously existing restaurant use. However, to the extent there was a restaurant use that has not been abandoned, it cannot be converted to another nonconforming use if the new use is not permitted as a matter-of-right without a use variance. See 11 DCMR Subsection 2003.5. The Zoning Administrator is obliged to interpret which alternative uses are permitted very strictly. As the courts have repeatedly recognized, any interpretation of the Zoning Regulations which seeks to expand the prerogatives of owners of structures containing nonconforming uses defeats one of the major purposes of the Zoning Regulations, namely, "the gradual elimination of * * * existing [nonconforming] structures and trades." Lenkin v. Board of Zoning Adjustment, 428 A.2d 356, 358 (D.C. 1981) quoting Woods v. District of Columbia, 39 A.2d 67, 69 (D.C. 1944). See also Sheridan-Kalorama Neighborhood Council v. Board of Zoning Adjustment, 411 A.2d 959, 963 (D.C. 1979). In fact, in C&P Building Limited Partnership v. District of Columbia Board of Zoning Adjustment, 442 A.2d 129, 131 (D.C. 1981), the Court noted that

> [b]oth this court and the Zoning Commission have stressed that nonconforming uses are not favored and must be regulated strictly so that the goals of the districting scheme established by the Zoning Commission are not undercut * * * .
>
> Thus, we have stressed that any interpretation of the Zoning Regulations which expands the prerogatives of nonconforming users is generally undesirable.

While prior to 1985 the Zoning Regulations permitted restaurants of many types as a matter-of-right in the C-1 through M Districts and in the CR and W Districts, although drive-in and drive-through restaurants were specifically prohibited in C-1 districts and other more restrictive districts, neither use was defined by the Zoning Regulations. See Zoning Commission Order No. 440, Case No. 83-6 (32 D.C. Reg. 4423 (July 26, 1985)). But see Section 4502.44 of the Zoning Regulations (1979).[1] As a result of the fact that fast food restaurants were beginning to locate within C-1 and C-2-A districts and were having a destabilizing effect on adjacent residential neighborhoods, the Zoning Commission

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[1] Since the term "restaurant" was not defined by the Zoning Regulations, the term must be understood as defined by Webster's Dictionary. Webster's defines a restaurant as a public eating place, as distinguished from a "carry-out" which is defined as a place where food is packaged and consumed away from its place of sale. However, the Zoning Regulations did distinguish between lunch counters, lunch rooms, cafes and restaurants, even though each was permitted first as a matter of right in the C-1 district. See Section 5101.33(Q) of the Zoning Regulations (1979).

adopted regulations defining drive-through restaurant, restaurant and fast food restaurant, establishing standards for drive-through uses and authorizing fast food restaurants, as a matter-of-right, in C-2-B districts, subject to certain site restraints.[2]

The Court of Appeals decision in Lenkin already referenced merit citation at length here because of its explanation of judicial and legislative history on point. The Court cited the Zoning Regulations § 7101.1, then entitled "Statement of Purpose." These provisions are now codified at 11 DCMR § 2000.3, cited above, providing that nonconforming uses be regulated strictly and permitted only under strict controls. The Court dismissed one of the petitioner's arguments as follows:

> Moreover, such interpretation tends to defeat one of the major purposes of the Zoning Regulations, namely, "the gradual elimination of . . . existing [nonconforming] structures and trades. Wood v. District of Columbia, D.C. Mun. App., 39 A.2d 67, 69 (1944). This point was reaffirmed by this court in Silverstone v. District of Columbia Board of Zoning Adjustment, D.C. App., 372 A.2d 1286 (1977), aff'd 396 A.2d 992 (1979):
>
> > Despite the protection given by the courts to such substantial property rights as nonconforming uses , the continuance of uses and structures that do not conform to the current zoning restrictions and to the general scheme of desirable land uses militates against the effectiveness of the planning and zoning scheme as a whole . . . .
>
> More recently, in Sheridan-Kalorama Neighborhood Council v. District of Columbia Board of Zoning Adjustment, [D.C. App., 411 A.2d 959 (1979)] at 963, we noted the "clear regulatory objective against nonconforming uses," and since nonconforming uses are not favored, "any interpretation of the regulations which expands the prerogatives of nonconforming use is undesirable." (Footnote omitted.) [Id. At 358.]

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[2] Since a fast food restaurant is not permitted as a matter-of-right in the same zoning district as a restaurant, the applicant cannot obtain relief *via* a special exception, but only a use variance.

The Court further stated:

> Moreover, upon examining the provisions of the 1938 Act and its legislative history, we conclude that while Congress was unwilling to empower the Zoning Commission to adopt regulations mandating the termination of nonconforming uses, it nevertheless gave the Zoning Commission broad authority to regulate both nonconforming uses and structures . . . Although the Zoning Enabling Act and Zoning Regulations protect nonconforming uses from arbitrary termination, they do not mandate any action that perpetuates such uses.

Id. At 359-360.

If a nonconforming use fits within the parameters set forth by law, the interested party is entitled to a certificate of occupancy. Hagans v. District of Columbia, 97 A.2d 922 (D.C. 1953). But an appellant is not entitled to a certificate of occupancy for a use not permitted by law. Nor, of course, may a certificate of occupancy issue merely on the declaration of the appellant that its proposed use is a continuance of a prior nonconforming use and that therefore, it may operate without further governmental review. Indeed, "the party asserting the right to the continuation of a nonconforming use must carry the burden of proof * * *. [and] establish at the administrative level that [the] use existed at the time of the enactment of the restrictive Zoning Regulations, that it was a lawful use at that time, and that it was a use entitled to be protected and served." C&P Bldg. Ltd. Partnership, supra at 133.

Thus, the nonconforming use at the premises should be strictly confined to the use in existence at the time it became nonconforming, that is a luncheonette and residence, with the luncheonette seating less than 50 persons. See also, 4 Rathkopf, The Law of Zoning and Planning, § 51A.02 at p. 51A-11 (1995) ("the right which a nonconforming owner has is only that which existed on the effective date of the ordinance which made the use nonconforming, the limits of which are marked by the character, size, and degree of use as it then existed."). A nonconforming use will be permitted to continue only if it is a continuance of substantially the same kind of use as that to which the premises were devoted at the time the regulations went into effect. Where there is doubt as to whether the change in use is substantial rather than insubstantial, the courts have consistently declared that it is to be resolved against the change in use. Id. at n. 25.

Where a business is involved it is recognized that the character of the business, the volume of trade and its effect on the neighborhood determine whether one business is a continuance of the business which is grandfathered. Id. At 51A-28. Thus, in the following examples, the courts have held the change in use to be invalid, on the ground that the new use does not amount to the same nonconforming use: (1) restaurant to a restaurant with dancing (Town of Belleville v. Parillo's, Inc., 416 A.2d 388 (N.J. 1980); (2) restaurant to a restaurant selling beer or snack bar to snack bar selling liquor (Fulford v. Board of Zoning Adjustment, 54 So.2d 580 (Ala. 1951) and In re Veltri's Appeal, 49 A.2d 369 (Pa. 1946)); and (3) restaurant and soda fountain to restaurant and tavern (Phillips v. Village of Oriskany, 394 N.Y.S.2d 941 (1977).

Here, the use that existed at the time it became nonconforming was that of a luncheonette on the first floor and basement and residence on the second floor. There was no delivery service, which the appellant and the owner of the property has conceded, and prior decisions of this Board and the representations of counsel for prior tenants, as well a prior opinion of the Corporation Counsel, recognize that to the extant there was any carry-out service it was subordinate to the dine-in use of the premises. Under the foregoing analysis, even if the Zoning Commission had never adopted regulations distinguishing between fast food restaurants and restaurants, the premises could not be changed from a nonconforming luncheonette to a fast food restaurant or food delivery use because of the substantial change in the character of the use, the increase in the nature of the use and its impact on the neighborhood. A contrary conclusion would allow the premises to be converted to a dinner theater, cabaret or some other use where food is sold but which has a substantially different impact on the neighborhood than the use in existence at the time the Zoning Regulations were adopted rendering the use nonconforming. In sum, the premises may not be used for any fast food restaurant, food delivery business or predominant carry-out business without a use variance.

The Zoning Regulations that took effect on May 12, 1958 recognized the following uses for all commercial districts:

**5101.33** Retail establishment, to include:
. . . .
(q) Lunch counter, lunch room, cafe, or restaurant.
. . . .

**5101.34** Other similar service or retail use, including assemblage and repair clearly incidental to the conduct of a permitted

service or retail establishment on the premises.

The Regulations intended that any use that was to become a nonconforming use upon their taking effect be recorded. For these purposes, the rules required as follows (italics in the original):

**7110.1** The operator of a *nonconforming* use shall register such use with the agent designated by the Commissioners of the District of Columbia . . .

**7110.2** Each *nonconforming* use lawfully existing on the effective date of these regulations shall be registered within 6 months after such effective date.

**7110.3** Each use which becomes a *nonconforming* use by the adoption of these regulations or any subsequent amendment to these regulations shall be registered within 6 months after the effective date of such amendment.

* * *

**7110.6** Failure to register a *nonconforming* use in such form and at such time as required by provisions of this Section shall be deemed a violation of these regulations.

While such registration provisions have not continued to the present, it is clear that all principal uses existing at the time that the Zoning Regulations came into effect would have been recorded soon thereafter, and that a certificate of occupancy would not have issued subsequently without reference to the registered uses. In the case of the instant premises, the same principal use has been noted on all certificates of occupancy since the rules came into effect: restaurant. Any other use at the premises would have been accessory and incidental, and therefore not entitled to become enlarged to the level of a principal use.

In a statement before the Board of Zoning Adjustment dated August 12, 1970, in BZA Appeal No. 10485, the Citizens' Association of Georgetown's Chairman of Zoning, Planning, and Building Regulations, Mrs. Harold B. Hinton, listed chronologically the certificates of occupancy that had been issued for the premises at 1661 35th Street, NW from 1951 through 1969. The listing shows that the 1951 certificate was the last certificate that permitted a use as "Delicatessen-Luncheonette." Every subsequent certificate

through 1969 was issued for a use as a "Restaurant." Every attempt to enlarge the use to include a carry-out has been denied.

Mrs. Hinton contended that the old delicatessen use was given up voluntarily in 1956, leaving only the more restrictive nonconforming restaurant use. She further argued that the matter had not gone to the Board because it was not a change of use but merely a dropping of one of two commercial uses ("the worse of the two.") She noted that during the subsequent 14 years, seven certificates had been issued to six different operators including the then-current one, all for the identical use, "restaurant seating less than 50 persons." She urged the Board to uphold the Zoning Administrator in denying any use other than "restaurant seating less than 50 persons" at 1661 35th Street, NW, citing the rules to the effect that "when an existing nonconforming use has been changed to a conforming or more restrictive use, it shall not be changed back to a nonconforming or less restrictive use." The Board ultimately did exactly as Mrs. Hinton had urged: it found that the prior certificate of occupancy for this site was for a "restaurant seating less than 50 persons," and affirmed the Zoning Administrator's refusal to expand that use beyond the last permitted use of record. Thus, the appellant is estopped from arguing that it had established any grandfathered carry-out use or food delivery use before.

Sometime after those appeals were decided, Whayne S. Quin, of the law firm of Wilkes & Artis, who represent the appellant in the instant matter, wrote the Corporation Counsel, C. Francis Murphy, in regard to the use of the premises. Mr. Quin argued that "a limited carry-out use (as opposed to a delicatessen) [was] permitted as a matter-of-right" at the premises. He further asserted that the restaurant operation of his client (Gionis, the new owner of the property) was "substantially different and more limited in use than the previous owner's use which was the subject of the prior Board cases. Absolutely no prepared or 'ready-to-eat food products' are available such as would be available at a 'delicatessen.'" Moreover, in no sense of analysis, is Mr. Gionis' business '90% . . . carry out.' His business is a 'restaurant' with the necessary indicia to make it a restaurant." In this last statement he apparently responded to a finding by the Board as to the prior owner that "Appellant alleges that approximately 90% of his business is carry-out and has been since prior to 1957." Thus, whereas the prior owner had sought to expand his use from restaurant to restaurant-delicatessen by arguing that the business had in fact been mostly carry-out for 13 years, the new owner, represented by new counsel, argued that in no way was the business mostly carry-out. Instead, he sought to continue carry-out operations under the guise of an accessory use incidental to a principal use as a restaurant.

However the succeeding assertions of fact and arguments of law may vary, the underlying constant thread to all prior proceedings has been an effort by the owners of the property to expand the use listed on the certificate of occupancy, and a consistent rejection by the zoning officials and the Board of each such attempt.

The appellant cites three prior proceedings, which are reviewed individually below, involving "the restaurant operation of the building." None of them supports its position. They show, instead, that the only accepted nonconforming use of the premises has been as a restaurant, and that operators at the premises over the years have been rebuffed in their attempts to expand that use either de jure or de facto.

The appellant in the 1970 BZA proceedings sought a variance to change the use of his property from a restaurant to a restaurant with delicatessen and carry-out. The Board of Zoning Adjustment denied the appeal (Appeal No. 10291) -- i.e., it denied a variance for the proposed expansion of the use of the premises beyond the existing restaurant use. The appellant requested reconsideration of the decision, asserting that it was entitled to continue nonconforming uses that predated the adoption of the 1985 amendments to the rules. The Board suggested that the appellant apply for a certificate of occupancy with the Zoning Administrator. The appellant did so, but the Zoning Administrator denied the application. The Board then declined to consider the outstanding petition for reconsideration, but did consider a new appeal (Appeal No. 10485), this time of the Zoning Administrator's denial of the application for a certificate of occupancy.

The Board, in the end, ruled that the evidence was in conflict concerning whether the asserted use of the premises as a restaurant and delicatessen had been a legally existing nonconforming use. It found that the prior certificate of occupancy was for a "restaurant seating less than 50 persons," and affirmed the Zoning Administrator's refusal to expand that use beyond the last permitted use of record. The final determination, after protracted proceedings before the Zoning Administrator and the Board, was that the permissible use of the premises was as a restaurant, and only a restaurant, not a carry-out or food delivery use.

A year after the Board proceedings the government warned the then-new owner of the business, Gionis, that the premises were being used "as a restaurant and delicatessen without a proper certificate of occupancy," and directed him to apply before the Board. Two years later, Gionis having declined to pursue this course, the government filed suit against him on the grounds that he was using the premises primarily as a carry-out business and that he was using contiguous open space as outdoors restaurant space, in violation of the certificate of occupancy.

The parties stipulated to a dismissal that provided, inter alia, that (a) there would be no restaurant use of the adjoining space; (b) Gionis would not enlarge the dining area beyond 50 seats; and (c) Gionis would not sell prepackaged food or drinks as is normally contemplated in a delicatessen.[3] The clear intent of the government's suit, and the result of the stipulation, was to limit the use of the premises -- in terms of the nature of that use, the space dedicated to that use, and the number of patrons allowed -- to the terms of the certificate of occupancy, i.e., restaurant seating fewer than 50 persons. That result does not support the appellant's bid to operate a pizza delivery service at the premises.

Twenty years later, the last operator of the business at the premises, the Orient Express, was charged with operating a fast-food restaurant in violation of its certificate of occupancy; in the words of the hearing examiner who heard the case, "virtually abandoning the concept of an eat-in/sit-down establishment." However, the investigator who had visited the premises testified," inter alia, that:

**a.** While there, he observed approximately six diners seated, with only one carry-out customer;

**b.** A sign which read "Fast, free delivery" had been there since before the respondent assumed ownership; and

**c.** He concluded that there was insufficient evidence to determine that the business was in violation of the Zoning Regulations (i.e., operating as anything other than a restaurant).

The charge was dismissed at the unopposed motion of the respondent. The hearing examiner, in granting the motion, admonished the respondent to operate the business "within the confines of his C of O, and if he [was] not doing so, [to] modify his operations." The business, in other words, was found to be operating as a restaurant only, and its owner was told to keep it that way.

In summary, none of the prior actions cited by the appellant supports the claim that the premises have inherited a right to continue an asserted nonconforming use of such character as to permit a principal use of pizza delivery. The only lawful and recognized use of the premises in the past has been simply and only as a restaurant. It is true that a restaurant is entitled to offer

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[3] This clause followed the language of the warning that, according to the appellant herein, was given originally to Gionis: use "as a restaurant and delicatessen without a proper Certificate of Occupancy." Statement of the Appellant at 5.

limited carry-out services as an accessory use. See, for example, 11 DCMR §§ 202, 301, and 321. But the appellant turns that concept on its head by proposing to operate a pizza delivery service and carry-out with minimal consumption on the premises limited to carry-out orders.

The appellant also defends against the charge of misrepresentations and false statements by citing two companion opinions of the Corporation Counsel dated May 25, 1965 and December 3, 1965, respectively. Throughout, the opinions address the interplay of certificates of occupancy and business licenses, and in particular the question of whether one or the other is to be considered dominant. Those are not the issues presented by the instant matter.

The first opinion responded to an inquiry from the Chief of Police phrased as follows: "Whether a person engaging in business under authority of a certificate of occupancy must secure new certificate when he adds to such business, in the same premises, an activity or commodity which can be offered to public only under authority of a license or permit." After consideration of the issues, the Corporation Counsel was of the opinion, inter alia, that:

> (4) [I]f an activity for which a license or permit has been issued is found not to be authorized by the Zoning Regulations, then, notwithstanding the issuance of the license or permit, if the activity has commenced, action should be taken to initiate prosecution for the violation of the Zoning Regulations, or to secure abandonment of the activity.

Id. At 6.

The second opinion was similarly phrased. Again, the focus was on the interplay between a license and a certificate of occupancy. The Deputy Chief of Police was concerned whether it would violate the Zoning Regulations to issue a permit to sell fireworks in a residential zone. The Corporation Counsel concluded as follows:

> [W]here the sale of fireworks is an activity usually associated with or customarily engaged in by retail establishments located in commercially zoned districts, there is no prohibition in the Zoning Regulations against the issuance to a similar establishment existing in a residential district as a

> nonconforming use of a license or permit to sell such commodities. (Emphasis added.)

The opinion said nothing about the issuance of a new certificate of occupancy for an additional nonconforming use, nor did it address the addition of such new uses under an existing certificate. It said, rather, that the Zoning Regulations did not prohibit the issuance of a license for the sale of fireworks.

The sale of fireworks in the District is a seasonal activity limited to a few days a year around the 4th of July. The Zoning Regulations do not address the sale of fireworks, and certificates of occupancy are not issued for such a purpose to businesses that are already in existence under a retailer's certificate of occupancy. No activities related to fireworks are listed in the rules as either permitted or prohibited uses, and the Subject Index for 11 DCMR contains no entry for "fireworks." Rather, the sale of fireworks is regulated through license fee provisions applicable to "establishments where fireworks are stored or kept for sale," and such a license requires the approval of the Fire Marshall, not of the Zoning Administrator. General License Law, D.C. Code § 47-2814(d) and (f) (1990). These licensing controls derive not from the zoning statute or rules, but rather from the statute authorizing the issuance and enforcement of police regulations, D.C. Code § 1-315 (1992).

Thus, the Corporation Counsel could not have meant that an activity that would normally require a certificate of occupancy could be carried out under a certificate issued for other purposes, especially when such an exception would apply only to nonconforming uses. He meant, instead, that separate licensing provisions for the sale of fireworks did not require the issuance of a certificate for these purposes where the establishment already held a certificate for a Grocery and Patent Medicine Store. That conclusion does not apply to the instant case. Fast-food restaurants and food delivery services are categories specifically set out in the Zoning Regulations separate from restaurants, and require specific certificates of occupancy. To interpret the Corporation Counsel's opinions as the appellant urges would run contrary to the zoning statute and regulations and the weight of applicable case law. The Corporation Counsel opinions in no way exempt the appellant from obtaining a certificate of occupancy for its proposed nonconforming use, nor from meeting the burden of proof to establish its entitlement to such a use.

Based upon the record before the Board, the Board finds that the appellant did not meet its burden of proof that its proposed use was grandfathered. It is therefore **ORDERED** that this appeal be **DENIED.**

**VOTE: 5-0** (Susan Morgan Hinton, Angel F. Clarens, Laura M. Richards, Sheila Cross Reid and Jerrily R. Kress to deny)

**BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT**

**ATTESTED BY:** Madeliene H. Dobbins
**MADELIENE H. DOBBINS**
**Director**

**FINAL DATE OF ORDER:** OCT 17 1997

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

ord16154/MHD

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

**BZA APPEAL NO. 16154:**

As Director of the Board of Zoning , I certify and attest that on OCT 17 1997 a copy of the order entered on that date in this matter was mailed first class, postage prepaid to each party in this application, and who is listed below:

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ATTESTED BY: Madeliene H. Dobbins
MADELIENE H. DOBBINS
Director

DATE: OCT 17 1997